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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 268

ITION NOT PRINTED

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CHARLES LEE PARKER,

Petitioner,

vs.

NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NORTH CAROLINA

PETITIONER'S BRIEF

NORMAN B. SMITH
728 Southeastern Building
Greensboro, N. C. 27402
Telephone AC 919 275-8552

LARRY B. SITTON
700 Jefferson Building
P. O. Drawer G
Greensboro, N. C. 27402
Telephone AC 919 273-8264

Counsel for Petitioner

INDEX

SUBJECT INDEX

	Page
Table of Citations	ii
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	6
Summary of the Argument	12
Argument:	
I. The Petitioner's Rights Under the Fourteenth and Fifth Amendments Were Abridged in Dismissing His Challenge to Indictment by a Grand Jury From Which the Members of His Own Race Had Been Systematically Excluded	16
A. It Is Established That There Was Systematic Exclusion of Negroes From the Grand Jury That Indicted Petitioner	16
B. Failure of Petitioner's Lawyer to Make a Motion to Quash the Indictment, in the Absence of Participation by Petitioner in That Decision, Does Not Constitute a Waiver of the Right to Obtain Relief for Exclusion of Negroes From the Grand Jury	19

Page

II. The Petitioner's Guilty Plea Must Be Set Aside as Having Been Obtained in Violation of the Fifth, Sixth, and Fourteenth Amendments, Because the Guilty Plea Removed the Threat of Capital Punishment, While That Threat Would Have Remained if Petitioner Had Pled Not Guilty 22

A. The State Has Not Shown That the Inherently Coercive Feature of the Statutes Relevant to This Case Did Not Render Petitioner's Guilty Plea Involuntary 22

B. *United States* v. *Jackson* Should Be Applied Retroactively to This Case 32

III. The Petitioner's Rights Under the Fourteenth and Fifth Amendments Were Violated by Allowing His Guilty Plea to Stand When It Followed a Coerced Confession, and There Was No Showing That the Plea Was Not Influenced by the Confession 39

Conclusion 45

Table of Citations

CASES:

Alford v. *North Carolina*, 405 F.2d 340 (4th Cir. 1968) 25, 29, 31, 38
Anders v. *California*, 386 U.S. 738 (1967) 34
Arsenault v. *Massachusetts*, 393 U.S. 5 (1968) 34

Berger v. *California*, 393 U.S. 314 (1969) 34, 35
Boykin v. *Alabama*, 37 U.S.L.W. 4474, June 2, 1969 25
Brookhart v. *Janis*, 384 U.S. 1 (1966) 21

Carnley v. *Cochran*, 369 U.S. 506 (1962) 20
Cassell v. *Texas*, 339 U.S. 282 (1950) 29
Chambers v. *Florida*, 309 U.S. 227 (1940) 43

Page

Chapman v. *California*, 386 U.S. 18 (1967) 31, 43
Clewis v. *Texas*, 386 U.S. 707 (1967) 42
Cobb v. *Balkcom*, 339 F.2d 95 (5th Cir. 1964) 21

Davis v. *North Carolina*, 384 U.S. 737 (1966) 45
Desist v. *United States*, 394 U.S. 244 (1969) 32, 33
De Stefano v. *Woods*, 392 U.S. 631 (1968) 33
Dorsciak v. *Gladden*, —— Or. ——, 425 P.2d 177 (1967) 43
Doughty v. *Maxwell*, 376 U.S. 202 (1964) 34
Duncan v. *Louisiana*, 391 U.S. 145 (1968) 22

Escobedo v. *Illinois*, 378 U.S. 478 (1964) 42

Fay v. *Noia*, 372 U.S. 391 (1963) 21
Fuller v. *Alaska*, 393 U.S. 80 (1968) 33

Gallegos v. *Colorado*, 370 U.S. 49 (1962) 41
Gideon v. *Wainwright*, 372 U.S. 335 (1963) 39

Haley v. *Ohio*, 332 U.S. 596 (1948) 41
Holliday v. *United States*, 37 U.S.L.W. ——, May 5, 1969 36

Johnson v. *New Jersey*, 384 U.S. 719 (1966) .. 32, 33, 35, 42
Johnson v. *Zerbst*, 304 U.S. 458 (1938) 20
Jones v. *Georgia*, 389 U.S. 24 (1967) 18

Kercheval v. *United States*, 274 U.S. 220 (1927) 35

Laboy v. *New Jersey*, 266 F.Supp. 581 (D.C. N.J. 1967) 29
Linkletter v. *Walker*, 381 U.S. 618 (1965) 33

Machibroda v. *United States*, 368 U.S. 487 (1962) 23
Malloy v. *Hogan*, 378 U.S. 1 (1964) 25
McConnell v. *Rhay*, 393 U.S. 2 (1968) 34
McNeil v. *North Carolina*, 368 F.2d 313 (4th Cir. 1966) 21
McNerlin v. *Denno*, 378 U.S. 575 (1964) 34

Page

Natale v. *United States*, 287 F.Supp. 96 (D.C. Ariz. 1968) 38
Norris v. *Alabama*, 294 U.S. 587 (1935) 19

People v. *Spencer*, 66 Cal.2d 158, 424 P.2d 715 (1967) 43
Pennsylvania ex rel. Herman v. *Claudy*, 350 U.S. 116 (1956) 22, 43
Pointer v. *Texas*, 380 U.S. 400 (1965) 24
Pope v. *United States*, 392 U.S. 651 (1968) 22, 26

Roberts v. *Russell*, 392 U.S. 293 (1968) 34

Scarber v. *State*, 226 Ark. 503, 291 S.W.2d 241 (1956) 28
Sims v. *Georgia*, 389 U.S. 404 (1967) 18
State v. *Covington*, 258 N.C. 495, 128 S.E.2d 822, 258 N.C. 501, 128 S.E.2d 827 (1963) 20
State v. *Forcella*, 52 N.J. 263, 245 A.2d 181 (1968) 25
State v. *Gibson*, 216 N.C. 535, 5 S.E.2d 717 (1939) 42
State v. *Harper*, —— S.C. ——, 162 S.E.2d 712 (1968) 24
State v. *Muse*, 219 N.C. 226, 13 S.E.2d 229 (1941) 24
State v. *Peele*, 274 N.C. 106, 161 S.E.2d 568 (1968) 25
State v. *Rorie*, 258 N.C. 162, 128 S.E.2d 229 (1962) 19
State v. *Spence*, 274 N.C. 536, 164 S.E.2d 593 (1968) 25
Stovall v. *Denno*, 388 U.S. 293 (1967) 32, 33, 36

Tehan v. *United States ex rel. Shott*, 382 U.S. 406 (1966) 33

United States v. *Bayer*, 331 U.S. 532 (1947) 42
United States v. *Jackson*, 390 U.S. 570 (1968) 13-14, 22-32, 36-39, 44-45

Von Moltke v. *Gillies*, 332 U.S. 708 (1948) 43

Page

Washington v. *Texas*, 388 U.S. 14 (1967) 24
White v. *Crook*, 251 F.Supp. 401 (D.C. Ala. 1966) 16
Whitus v. *Georgia*, 385 U.S. 545 (1967) 18, 19
Williams v. *Georgia*, 349 U.S. 375 (1955) 19
Witherspoon v. *Illinois*, 391 U.S. 510 (1968) 34
Wong Sun v. *United States*, 371 U.S. 471 (1963) 42

CONSTITUTIONAL PROVISIONS:

Constitution of the United States
Amendment V 2-3, 12-13, 15-16, 22, 25, 29, 39
Amendment VI 2-3, 13, 22, 25, 29
Amendment XIV 2, 4, 12-13, 15-16, 22, 24, 39

Constitution of the State of North Carolina
Article I, Sec. 13 ..... 4, 24

STATUTES:

Federal Bank Robbery Act, 18 U.S.C. Sec. 2113 (e) (1964) 22, 26, 37
Federal Communications Act, Sec. 605 33
Federal Kidnapping Act
18 U.S.C. Sec. 1201(a) (1964) 22, 37, 38
18 U.S.C. sec. 1111 37
21 U.S.C. sec. 176b 37
42 U.S.C. sec. 2274-76 37
47 Stat. 326 (1932) 26
48 Stat. 781 (1934) 26
48 Stat. 783 (1934) 26
D.C. Code Ann., Sec. 22-2801 37
La. Code Crim. Proc., Art. 557 37
N.J. Stat. Ann., 2A:113-3, 4 37
N.H. Rev. Stat. Ann., 585:4, 5 37
N.Y. Code Crim. Proc., Sec. 332.1 37
N.C.G.S. sec. 9-1 (1953) 17
N.C.G.S. sec. 9-2 (1953), (1967) 17

Page

N.C.G.S. sec. 9-3 (1953) 17
N.C.G.S. sec. 9-24 (1953) 17
N.C.G.S. sec. 9-26 (1953) 17, 19
N.C.G.S. sec. 14-17 (1953) 24
N.C.G.S. sec. 14-21 (1953) 24
N.C.G.S. sec. 14-52 (1953) 4, 23
N.C.G.S. sec. 14-58 (1953) 24
N.C.G.S. sec. 15-162.1 (1965) 5, 24
N.C.G.S. sec. 15-217 6
N.C. Session Laws 1941, c. 215, s. 1, 2 26
N.C. Session Laws 1949, c. 299, s. 1, 4 26
N.C. Session Laws 1953, c. 616 26
N.C. Session Laws 1967, c. 218, s. 1 17
N.C. Session Laws 1969, c. 117 24
S.C. Code, sec. 17-553.4 37
Tex. Vernon's Ann. Code Crim. Proc., Art. 1.14 37
Wash. Rev. Code, secs. 9.48.030, 10.01.060, 10.49.010 (1956) 28
Wyo. Stat. Ann., sec. 6-59 37

MISCELLANEOUS:

Federal Rules Criminal Procedure, Rule 11 ....27-28, 36
Finkelstein, The Application of Statistical Decision Theory to the Jury Discrimination Cases, 80 Harv. L. Rev. 338 (1966) 18

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PETITIONER'S BRIEF

Opinion Below

The opinion of the Court of Appeals of North Carolina is reported at 2 N.C.App. 27, 162 S.E.2d 526.

Jurisdiction

The judgment of the Court of Appeals of North Carolina was made and entered on August 14, 1968, and a copy thereof is set out in the Appendix. The jurisdiction of this

Court is invoked under 28 U.S.C. 1257(3). By virtue of the provisions of North Carolina General Statutes Sec. 7A-28, the judgment of the Court of Appeals of North Carolina is final, and not subject to further review by the Supreme Court of North Carolina.

Questions Presented

1. Whether it is a denial of the prisoner's rights under the Fourteenth and Fifth Amendments to the Constitution of the United States, in a state proceeding, for the prisoner to be precluded from proving the lack of jurisdiction of the court in which he was tried and convicted because of racial discrimination in the selection of the grand jury which indicted him, on the ground of his failure to make a motion to quash the indictment, when it is uncontradicted that the prisoner did not know of his right to indictment by a grand jury free of racial discrimination, and did not voluntarily relinquish this right.

2. Whether it is a denial of the defendant's rights under the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States in a state proceeding, for the defendant to be convicted and sentenced to life imprisonment for the capital offense of burglary, upon a guilty plea, under a statutory procedure whereby a plea of not guilty involves the threat of capital punishment, but a plea of guilty immunizes the defendant from capital punishment, in the absence of proof beyond a reasonable doubt that this statutory arrangement did not influence the defendant to plead guilty.

3. Whether it is a denial of the defendant's rights under the Fifth, Sixth, and Fourteenth Amendments to the Con-

stitution of the United States in a state proceeding, for a plea of guilty to be allowed to support a conviction and life sentence for the crime of burglary, where a prior involuntary confession was obtained from the defendant, the defendant believed this confession would be used against him if he pleaded not guilty, and the State has not established beyond a reasonable doubt a lack of connection between the coerced confession and the guilty plea.

Constitutional and Statutory Provisions Involved

Constitution of the United States:

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of

the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of North Carolina:

ARTICLE I, SECTION 13:

Right of jury.—No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful persons in open court. The Legislature may, however, provide other means of trial, for petty misdemeanors, with the right of appeal.

General Statutes of North Carolina:

N.C.G.S. §14-52 (1953)

Punishment for burglary.—Any person convicted, according to due course of law, of the crime of burglary in the first degree shall suffer death: Provided, if the jury when rendering its verdict in open court shall

so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. Anyone so convicted of burglary in the second degree shall suffer imprisonment in the State's prison for life, or for a term of years, in the discretion of the Court.

N.C.G.S. §15-162.1 (1965)

Plea of guilty of first degree murder, first degree burglary, arson or rape.—(a) Any person, when charged in a bill of indictment with the felony of murder in the first degree, or burglary in the first degree, or arson, or rape, when represented by counsel, whether employed by the defendant or appointed by the court under G.S. 15-4 and 15-5, may, after arraignment, tender in writing, signed by such person and his counsel, a plea of guilty of such crime; and the State, with the approval of the court, may accept such plea. Upon rejection of such plea, the trial shall be upon the defendant's plea of not guilty, and such tender shall have no legal significance whatever.

(b). In the event such a plea is accepted, the tender and acceptance thereof shall have the effect of a jury verdict of guilty of the crime charged with recommendation by the jury in open court that the punishment shall be imprisonment for life in the State's prison; and thereupon, the court shall pronounce judgment that the defendant be imprisoned for life in the State's prison.

(c). Unless and until the State accepts such plea, no reference shall be made in open court at the time

of arraignment or at any other time to the tender or proposed tender of such plea; and the fact of such tender shall not be admissible as evidence either for or against the defendant in the trial or at any other time and place. The defendant shall have the right to withdraw such plea, without prejudice of any kind, until such time as it is accepted by the State.

Statement of the Case

The petitioner, Charles Lee Parker, was sentenced to life imprisonment for first degree burglary, upon a guilty plea, by the Superior Court of Halifax County, North Carolina, on August 18, 1964. (App. 40) He commenced proceedings under the North Carolina Post Conviction Hearing Act, N.C.G.S. Sec. 15-217, et seq. (1965), in the Superior Court of Halifax County. The questions raised in this proceeding were before the court in the post conviction proceeding. (App. 2-7) Judgment denying the petitioner's prayer for a new trial was entered on December 19, 1967. (App. 27-30) A writ of certiorari to review this judgment was granted by the Court of Appeals of North Carolina (App. 38) and on August 14, 1968, the Court of Appeals affirmed the judgment denying petitioner a new trial.

The petitioner, a Negro, was convicted of the crime of burglary and sentenced to life imprisonment when he was 15 years old. On July 16, 1964, he was arrested at gunpoint and taken to the Roanoke Rapids, North Carolina, police station where he was questioned by white members of the police force. At first, the petitioner refused to answer any questions. At the outset he asked to see his

mother and a lawyer. The police said that he could not see anyone until he made a confession. The petitioner was questioned for an hour or two, and at about 11:00 p.m. he was placed in a single unlighted cell. In petitioner's cell there was a drinking fountain, but no water would come from it. (App. 40-41)

At about 3:40 a.m. on the day following petitioner's arrest, two policemen went to his house and told his mother, Mrs. Viola Parker that they had picked up the petitioner for being a "peeping tom." They told her there was no use for her to go to the station, since she would not be able to see her son. (App. 51)

The petitioner was questioned again by the police on the day following the arrest. Again he asked to see a lawyer. After about an hour of interrogation, petitioner confessed to breaking in a house; later he signed a written confession. After the confession was obtained, the petitioner was given food for the first time since he had been arrested. (App. 43)

The petitioner was transferred to the Halifax County Jail, where he remained until his trial on August 18, 1964. (App. 41) The petitioner's mother was with a newborn child and was unable to visit him while he was at the county jail. (App. 52) Petitioner's sister, Doris Jean Usserey, attempted to visit him on three different occasions. Petitioner's sister called the jail in advance to find out when visiting hours were, and each time she attempted to visit the petitioner, she arrived at a time which she had been advised was within the visiting hour period. On each occasion, the officers at the jail refused to let her see the petitioner. (App. 58-59)

Petitioner's mother retained Dwight Cranford, an attorney of Roanoke Rapids, North Carolina, to represent petitioner. As a witness for the State in the post conviction hearing, Mr. Cranford testified that the petitioner told him he had not been threatened, no promises had been made to him, and he was not scared at the time he confessed. (App. 66-67) He said he and petitioner were together most of the day preceding the trial and the day of the trial. The petitioner and his mother signed affidavits to the effect that they understood the seriousness of the charge and sentence, and that no threats, abuse, or promises had been made, and that they agreed to the entry of a plea of guilty. (App. 67-68) Mr. Cranford told petitioner that if he were to plead not guilty, he would receive the death sentence unless the jury recommended mercy, but that by pleading guilty he would receive a life sentence. The attorney advised petitioner to plead guilty. Mr. Cranford testified he did not remember any discussion with the petitioner as to whether the confession could be kept out of evidence. He said he knew that if the confession was not kept out, the petitioner was "sunk." (App. 71) Petitioner thought that since he had confessed to the police, there was little his attorney could do. (App. 42) The threatened use of the involuntary confession influenced petitioner to plead guilty. (App. 5)

Petitioner was questioned by the court before his plea was accepted. (App. 46) He gave negative answers to routine questions about whether promises had been made or force applied to secure his guilty plea, and whether the plea was made with fear or compulsion. (App. 46)

At the post conviction proceeding, petitioner was allowed to introduce into evidence a medical résumé done

at the prison, which concluded that petitioner is an uninhibited and impulsive individual, and that he would likely become involved in any direct behavior pattern that presented itself as a means of securing his immediate goals. (App. 65, 77-78)

Police officers present at the post conviction hearing, who had knowledge of petitioner's arrest, interrogation, and detention, were not examined by the State on these subjects; and hence petitioner's testimony summarized here was uncontradicted. (App. 40-41, 73-75)

The grand jury that indicted petitioner had 18 members, only one of whom was a Negro. (App. 14, 17, 62) There were eight Negroes among the 98 persons who served on all the grand juries which sat in Halifax County, for the four years preceding the petitioner's trial. (App. 62) During the same period, 2,820 white persons and 134 colored persons were on all of the venires drawn for grand and petit jury service. (App. 61) From the testimony of the clerk to the jury commission of Halifax County, it appeared that the commissioners compiled the jury list from the county tax records, by taking the names of persons whom they knew to be of good moral character, never convicted of a crime, and of sufficient intelligence to serve on a jury. (App. 55-56) This officer testified that all the commissioners were white people, that they naturally knew more white people than Negroes. He said in his opinion many Negroes were omitted from the list because the commissioners did not know anything about them and did not know whether they were fit to serve or not. (App. 63) He said, however, that no names were rejected because of race. (App. 63) Separate tax records are maintained for white and colored taxpayers in Halifax County. One copy

of the jury list was cut into strips and put in the jury box from which jurors are drawn. (App. 55) Grand jurors serve for one year; every six months nine new members of the grand jury are drawn to replace those whose terms have expired. (App. 57-58)

At the post conviction proceeding, it was stipulated by counsel that approximately 11,000 white persons and 7,000 colored persons were listed in the 1960 and 1964 levies in Halifax County. (App. 58) It was also stipulated that, according to the 1960 census of Halifax County, of the persons 21 years of age and older, 54.5% were white and 45.5% were non-white; also, of the total population, 45.3% were white and 54.7% were Negro. (App. 64, 76)

The testimony of Hubert M. Blalock, Jr., a professor of statistics in the Sociology Department of the University of North Carolina, was excluded by the court. The court stated that testimony about probabilities was concerned with gambling, that the witness was a gambler, and that he might as well go to Las Vegas to make his living. (App 64-65) According to his affidavit, which is a part of the record, Mr. Blalock would have testified that the probability of getting one (or no) Negro juror out of a total of 18 grand jurors in a county with a Negro population comparable to that of Halifax County, where a racially non-discriminatory selection process is used, is 13 in 10,000 or approximately one in 1,000. (App. 19-20)

The petitioner did not make a motion to quash his indictment before trial and did not raise the question of racial discrimination in the selection of the grand jury prior to the post conviction proceeding. The petitioner testified that he did not know anything about racial com-

position of the Halifax County grand jury at the time he was tried and sentenced. (App. 42) Dwight Cranford, the petitioner's attorney, did not discuss with him the racial makeup of grand juries in the county, nor the possibility of quashing the bill of indictment. (App. 72)

With respect to the issues raised in this proceeding, the Court of Appeals of North Carolina held (1) the statutory system whereby the plea of not guilty to a capital offense entails the risk of the death penalty, while the plea of guilty eliminates that risk, does not deny a criminal defendant's constitutional rights; (2) the petitioner's confession was not involuntary, and the petitioner's guilty plea was not a product of the confession; and (3) failure to make a motion to quash the indictment in apt time waives a criminal defendant's right to have the indictment, conviction, and sentence set aside on the ground of systematic exclusion of members of his race from grand jury service.

Summary of the Argument

I.

The Petitioner's Rights Under the Fourteenth and Fifth Amendments Were Abridged in Dismissing His Challenge to Indictment by a Grand Jury, From Which the Members of His Race Had Been Excluded Systematically.

A. It Is Established That There Was Systematic Exclusion of Negroes From the Grand Jury That Indicted Petitioner.

There was but a single Negro on the 18-man grand jury that returned the indictment, and only eight Negroes were among the 98 persons who had served on all the grand juries in the county where petitioner was tried, for the four years preceding his trial. Negroes comprised 45% of the adult population of the county, and 39% of the taxpayers of the county. The jury commissioners were all white persons. The jury lists were taken from segregated tax books.

The State did not offer any evidence, other than unsupported opinions, to rebut petitioner's prima facie case of racial discrimination in grand jury selection.

B. Failure of Petitioner's Lawyer to Make a Motion to Quash the Indictment, in the Absence of Participation by Petitioner in That Decision, Does Not Constitute a Waiver of the Right to Obtain Relief for Exclusion of Negroes From the Grand Jury.

Petitioner did not know anything about the racial composition of grand juries in the county where he was tried,

and he did not have any discussions of this subject with his lawyer. Petitioner and his lawyer did not discuss the possibility of quashing the bill of indictment. The court below held that failure to make the motion to quash barred relief.

Because petitioner neither had independent knowledge nor was informed by his counsel, of a right to attack the racial discrimination in the composition of his grand jury, there is no basis for a finding that he effectively waived this right by failing to make a motion to quash the indictment.

II.

The Petitioner's Guilty Plea Must Be Set Aside as Having Been Obtained in Violation of the Fifth, Sixth, and Fourteenth Amendments, Because the Guilty Plea Removed the Threat of Capital Punishment, While That Threat Would Have Remained if Petitioner Had Pled Not Guilty.

A. The State Has Not Shown That the Inherently Coercive Feature of the Statutes Relevant to This Case Did Not Render Petitioner's Guilty Plea Involuntary.

The North Carolina statutes under which petitioner was convicted and sentenced, are identical in all material respects to the statutes condemned in *United States* v. *Jackson*, on the ground that they place an impermissible burden upon the Fifth Amendment right of an accused not to plead guilty and the Sixth Amendment right of an accused to a jury trial. The guilty plea should be set aside in this case, on the authority of *United States* v. *Jackson*, because

in addition to the inherently coercive nature of the statutes, the factors of petitioner's youth, his limited experience, his mental aberration, and the advice and encouragement to plead guilty given by his counsel, establish that petitioner's guilty plea was involuntary. The State has failed to discharge the burden of proof incumbent upon the State by virtue of the illegality of the statutory arrangement, that these statutes did not cause petitioner's plea to be involuntary.

B. United States v. Jackson Should Be Applied Retroactively to This Case.

Because the guilty plea is the only sure means to escape capital punishment, there is a great probability that defendants, who are not in fact guilty, would offer guilty pleas to preserve their lives. The entry of a guilty plea acts as a surrender of all of the criminal due process rights, which collectively operate to insure the validity of the fact-finding process.

At the same time, statutes which possess the defects condemned in *United States* v. *Jackson,* exist in only nine states and the federal jurisdiction, and prisoners serving life sentences pursuant to these statutes, who would be potential beneficiaries of retroactive application of this case, are not sufficiently numerous to have a gravely disruptive effect on the administration of justice. For these reasons, *United States* v. *Jackson* should be applied retroactively to the present case.

III.

The Petitioner's Rights Under the Fourteenth and Fifth Amendments Were Violated by Allowing His Guilty Plea to Stand, When It Followed a Coerced Confession, and There Was No Showing That the Plea Was Not Influenced by the Confession.

The confession obtained from petitioner was coerced, because he was questioned for a substantial period of time at night without the presence of friendly adults, and was kept in an isolation cell overnight before the confession was obtained. The confession was also involuntary, by reason of continuation of the interrogation by the police after petitioner had requested to see his attorney and this request had been denied.

Petitioner testified that the confession had influenced him to plead guilty, and it is clear that petitioner's trial counsel was afraid the State would be able to use the confession against his client.

The State offered no evidence to show that the confession had been without effect on the guilty plea. Without proof by the State that there was no relationship between the confession and the guilty plea, the guilty plea should not be allowed to stand.

ARGUMENT

I.

The Petitioner's Rights Under the Fourteenth and Fifth Amendments Were Abridged in Dismissing His Challenge to Indictment by a Grand Jury From Which the Members of His Own Race Had Been Excluded Systematically.

A. It Is Established That There Was Systematic Exclusion of Negroes From the Grand Jury That Indicted Petitioner.

The petitioner, a Negro, was indicted by a grand jury from which the members of his race had been excluded systematically. There was a single Negro on the 18-man grand jury that returned the indictment. Only eight Negroes were among the 98 persons who had served on all the grand juries of Halifax County, North Carolina, for the four years preceding petitioner's trial, and during the same period there were 2,820 white persons and 134 colored persons on all the venires drawn for grand and petit jury service. Yet Negroes comprised 54.7% of the population and about 45% of the population over the age of 21 of Halifax County during the four year period, and about 39% of the persons enumerated on the tax lists of the county were Negroes.[1]

Separate tax records were maintained for white and colored taxpayers in Halifax County at the time of peti-

[1] Juries were virtually all male, as well as being nearly all white, because no toilet facilities were available for women in the old courthouse. (App. 57) No identifiably female names appear in the lists of grand jurors who served during the four years to and including the time of petitioner's indictment. (App. 15-17) This circumstance is not without significance in a case where burglary and rape are alleged. Cf., *White* v. *Crook*, 251 F. Supp. 401 (D.C. Ala. 1966).

tioner's indictment. The jury list was compiled from the county tax records by the jury commissioners, who selected the names of persons whom they knew to be of good character, never convicted of a crime, and of sufficient intelligence to serve on a jury. All of the commissioners were white people, and as the clerk to the jury commission testified, the jury commissioners knew more white people than Negroes. The clerk said that in his opinion many Negroes were omitted from the jury list because the commissioners did not know anything about them and did not know whether they were fit to serve or not. The clerk asserted that no names were rejected because of race, but the State offered no concrete evidence tending to disprove racial discrimination in selection of juries.

In Halifax County grand jurors serve for one year. Every six months nine members of the 18-member grand jury retire, and nine new members are drawn from the names contained in the jury box to replace them. The jury box contains one copy of the jury list, which has been cut into strips each consisting of a single name.[2]

The testimony of statistics professor Hubert M. Blalock, Jr., was excluded by the court, the judge stating that testimony about probabilities was concerned with gambling and that the witness might as well go to Las Vegas to make his living. Mr. Blalock's evidence of statistical probabilities regarding jury selection is part of the record in this case, however. Also the Court may take judicial notice of

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[2] This procedure was outlined in N.C.G.S. sec. 9-1, -2, -3, -24, -26 (1953). By N. C. Session Laws 1967, c. 218, s. 1, these statutes were repealed, and a new N.C.G.S. sec. 9-2 (1967) requires that the jury commission use tax lists, voter registration lists, and any other source deemed reliable to compile the jury list; the highly subjective standards of "good moral character" and "sufficient intelligence" have been eliminated.

statistical probabilities relating to the figures set out above. *Whitus* v. *Georgia,* 385 U. S. 545, 552 n. 2 (1967), citing Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases,* 80 Harv. L. Rev. 338 (1966). The probability of getting one (or no) Negro juror on the grand jury which indicted petitioner, by using a non-discriminatory selection process in Halifax County, is 13 in 10,000 or about one in 1,000. The probability of having only eight Negroes among the 98 grand jurors who served over the four year period to and including the time of petitioner's indictment, by use of a non-discriminatory selection process, amounts to less than one in ten million.

Petitioner's evidence summarized above was amply sufficient to make out a prima facie case of systematic exclusion of Negroes from the grand jury, since the relevant criteria established a more extreme instance of grand jury discrimination than has been condemned by recent decisions of this Court. *Whitus* v. *Georgia, supra; Jones* v. *Georgia,* 389 U.S. 24 (1967); *Sims* v. *Georgia,* 389 U.S. 404 (1967).[3]

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[3]

	Whitus v. *Georgia*	*Jones* v. *Georgia*	*Present Case*
Population over 21	42.6% Negro men	30.7% Negro	45% Negro
Jury Commissioners	White (apparently)	White	White
Source of Juror Names	Tax digests separated and identified as to race	Three tax digests, two of which separated and identified as to race	Tax digests separated identified to race
Taxpayers	27.1% Negro	19.7% Negro	39% Negro
Negro Jurors	9.1% grand jury venire	5.0% of jury list and box	7.5% of grand juries over four years 5.5% of grand jury in this case
Rebuttal Evidence by State	None	None	None

The use of a segregated source, such as tax books separated by race, in itself causes the selection system to be suspect. *Whitus* v. *Georgia, supra; Williams* v. *Georgia,* 349 U.S. 375 (1955). The unsupported and unexplained opinion of the clerk to the jury commission that Negroes had not been excluded purposely from grand jury service, was the only rebuttal evidence offered by the State. This alone is unavailing to overcome petitioner's prima facie case. *Norris* v. *Alabama,* 294 U.S. 587 (1935); *Whitus* v. *Georgia, supra.*

B. Failure of Petitioner's Lawyer to Make a Motion to Quash the Indictment, in the Absence of Participation by Petitioner in That Decision, Does Not Constitute a Waiver of the Right to Obtain Relief for Exclusion of Negroes From the Grand Jury.

The Court of Appeals of North Carolina held that the petitioner had waived his right to be indicted by a grand jury free of racial discrimination, by failing to make a timely motion to quash the indictment. The petitioner, a 15 year old child, knew nothing about the racial composition of grand juries in Halifax County. The petitioner and his attorney did not discuss the racial makeup of grand juries in the county, nor the possibility of quashing the bill of indictment.

Statutory and case law in North Carolina which deem a motion to quash an essential prerequisite to attacking systematic exclusion of Negroes from the grand jury,[4] are

[4] *State* v. *Rorie,* 258 N.C. 162, 128 S.E.2d 229 (1962); N.C.G.S. sec. 9-26 (1953).

inexplicably inconsistent with North Carolina authority holding that the entry of a guilty plea does not amount to a waiver in this regard. *State* v. *Covington,* 258 N.C. 495, 128 S.E.2d 822, 258 N.C. 501, 128 S.E.2d 827 (1963). Hence, under the North Carolina practice, petitioner's entry of a guilty plea in this case is not regarded as waiving the right to attack the composition of the grand jury.

Petitioner's unwitting failure to instruct his lawyer to interpose a technical motion, according to the Court of Appeals of North Carolina, now is binding upon the petitioner for the duration of his life sentence in prison.

Indictment by a grand jury from whose ranks the members of defendant's race have not been systematically excluded is a fundamental right, violation of which operates to void the indictment and the ensuing conviction and sentence as well. *Cassell* v. *Texas,* 339 U.S. 282 (1950).

This Court has defined waiver as "an intentional relinquishment or abandonment of a known right or privilege," and has declared that every reasonable presumption will be indulged against the waiver of fundamental constitutional rights. *Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1938). Also this Court has pointed out that mere silence of the record raises no presumption of waiver, and that waiver cannot be found in the absence of some affirmative conduct on the part of a defendant evidencing a deliberate and conscious rejection of a constitutional guaranty. *Carnley* v. *Cochran,* 369 U.S. 506 (1962).

This Court has made it clear that for a criminal defendant to waive a fundamental constitutional right, he cannot be bound by the acts of his lawyers; there must be evi-

dence that the defendant personally participated in the decision. *Fay* v. *Noia,* 372 U.S. 391 (1963). This standard was applied in *Brookhart* v. *Janis,* 384 U.S. 1 (1966), where it was held that a state criminal defendant could not be bound by his counsel's agreement to a prima facie trial, in which the state would need only to make a prima facie showing of guilt, and the defendant would neither offer evidence nor cross examine witnesses. In the present case, as in *Brookhart* v. *Janis,* 384 U.S. at 8, petitioner "neither personally waived his right nor acquiesced in his lawyer's attempted waiver," and hence the right to indictment by a legally constituted grand jury was not waived effectively.

The United States Court of Appeals for the Fourth Circuit has made the constitutionally requisite application of these doctrines to a fact situation identical with that of the present case. *McNeil* v. *North Carolina,* 368 F.2d 313 (4th Cir. 1966), holds that failure of a state criminal defendant to make a motion to quash the indictment on the ground of systematic exclusion of Negroes from the grand jury, does not support a finding that this defect was waived, in the absence of evidence showing an intelligent consultation between the defendant and his attorney on this subject. Accord, *Cobb* v. *Balkcom,* 339 F.2d 95 (5th Cir. 1964). It is anomalous that the resolution of the rights of North Carolina petitioners, who have been indicted by improperly selected grand juries, should depend on whether the proceedings are in the State courts under the rule of the Court of Appeals of North Carolina in the present case, or in the federal courts under the rule of *McNeil* v. *North Carolina, supra.*

II.

The Petitioner's Guilty Plea Must Be Set Aside as Having Been Obtained in Violation of the Fifth, Sixth, and Fourteenth Amendments, Because the Guilty Plea Removed the Threat of Capital Punishment, While That Threat Would Have Remained if Petitioner Had Pled Not Guilty.

A. The State Has Not Shown That the Inherently Coercive Feature of the Statutes Relevant to This Case Did Not Render Petitioner's Guilty Plea Involuntary.

The present case is controlled by *United States* v. *Jackson,* 390 U.S. 570 (1968). There the Court struck down the death penalty provisions of the Federal Kidnapping Act, 18 U.S.C. sec. 1201(a) (1964), on the ground that it placed an impermissible burden upon the Fifth Amendment right of an accused not to plead guilty and the Sixth Amendment right of an accused to a jury trial.[5] The rights of a defendant in a state criminal proceeding not to plead guilty, *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U.S. 116 (1956), and to be tried by an impartial jury, *Duncan* v. *Louisiana,* 391 U.S. 145 (1968), are secured by the Due Process Clause of the Fourteenth Amendment.

United States v. *Jackson* holds that it is unconstitutional to have the death penalty available as an optional punishment incidental to jury trial upon a not guilty plea, while

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[5] *Pope* v. *United States,* 392 U.S. 651 (1968), following *United States* v. *Jackson,* set aside a death sentence imposed on a conviction and jury direction of punishment by death, in a prosecution under the Federal Bank Robbery Act, 18 U.S.C. sec. 2113(e) (1964).

the defendant is given the alternative of pleading guilty or waiving jury trial with an immunity from the death penalty. The Court established the invalidity of imposing the death penalty within this structure.

The defect that the Court found in the Federal Kidnapping Act was its inducement to plead guilty and forego trial by jury. "(T)he evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them." *United States* v. *Jackson, supra,* 390 U.S. at 583.

The statutory arrangement holds out a promise to the accused who stands before the bar of justice—the promise of life itself, that his life will be spared. A guilty plea, if induced by a promise which deprives it of the character of a voluntary act, is void. *Machibroda* v. *United States,* 368 U.S. 487 (1962).

In the present case, petitioner pled guilty to the crime of first degree burglary, and the court entered a life sentence, the only penalty the statute provides for guilty pleas to capital offenses. Had petitioner exercised his right to trial by jury upon a plea of not guilty, he would have risked the imposition of the death sentence by the jury. Petitioner was a victim of the constitutional defect of the statutory structure. It was because of the possible prejudice to a person in petitioner's position, that the Court arrived at its decision in *United States* v. *Jackson,* and hence it is necessarily contemplated by that decision that relief be granted in a case like the present one.

Petitioner was sentenced pursuant to N.C.G.S. sec. 14-52 (1953), which provides that first degree burglary is to be

punished by death, except that, "if the jury when rendering its verdict in open court shall so recommend, the punishment shall be imprisonment for life in the State's prison, . . ."[6] The only way for a defendant charged with first degree burglary to avoid the risk of capital punishment was to submit a guilty plea in writing, which must be accepted by the State with the approval of the court, which resulted in an automatic sentence of life imprisonment. N.C.G.S. sec. 15-162.1 (1965).[7]

In North Carolina a defendant may not waive trial by jury. N.C. Const., Art. I, sec. 13; *State* v. *Muse,* 219 N.C. 226, 13 S.E.2d 229 (1941). Under the federal procedure condemned in *United States* v. *Jackson,* the defendant had two options to avoid the death penalty, first, the guilty plea, and second, the plea of not guilty with trial by a judge. In North Carolina this second option is not available. Its absence aggravates the unfairness of the North Carolina procedure, because the avoidance of capital punishment entails waiver of the remaining Fourteenth Amendment rights associated with trial—confrontation and cross-examination of opposing witnesses, *Pointer* v. *Texas,* 380 U.S. 400 (1965); compulsory process for obtaining witnesses for the defendant, *Washington* v. *Texas,* 388 U.S. 14 (1967);

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[6] The other capital felonies in North Carolina are first degree murder, arson, and rape. The statutes providing for penalties for these crimes are similar to the statute quoted in the text. N.C.G.S. sec. 14-17, -21, -58 (1953).

[7] This provision was repealed by N. C. Session Laws 1969, c. 117. Presently there is no way to eliminate the risk of the death penalty in a North Carolina capital felony prosecution. By judicial construction, South Carolina has chosen an identical remedy for the defect identified in *United States* v. *Jackson. State* v. *Harper,* —— S.C. ——, 162 S.E. 2d 712 (1968).

privilege against compulsory self-incrimination, *Malloy* v. *Hogan*, 378 U.S. 1 (1964).[8] The absence of the right to waive trial by jury and have a trial by judge instead, renders the North Carolina statutory system "more conspicuously invalid than the federal statute in *Jackson*, because under the federal statute an accused could assert his innocence and avoid a death sentence by a bench trial, while in . . . (North Carolina) avoidance of a death sentence may be accomplished only by waiver of the right to plead not guilty *and* by waiver of the right to a jury trial." *Alford* v. *North Carolina*, 405 F.2d 340, 346 (4th Cir. 1968).[9]

The North Carolina courts have declined to follow *United States* v. *Jackson* in the present case and other recent cases.[10] The distinction between the respective fact situations and between North Carolina statutes and the Federal Kidnapping Act, which the North Carolina courts in these decisions, and the respondent in his brief in opposition to the petition in the present case, have sought to make, are

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[8] See *Boykin* v. *Alabama*, 37 U.S.L.W. 4474, June 2, 1969.

[9] Justice Bobbitt, dissenting in *State* v. *Spence*, 274 N.C. 536, 545, 553, 164 S.E.2d 593, 598, 603 (1968), addressing himself to the absence of a procedure for trial without a jury in North Carolina, said, "If there be any real difference, it would seem that the pressure upon a defendant to enter a plea that will avoid the 'risk of death' would be greater under our statutes." To the contrary is *State* v. *Forcella*, 52 N.J. 263, 245 A.2d 181 (1968), where it was concluded that *United States* v. *Jackson* applies only when there are two alternative guilt-determining processes and the jury trial alternative produces greater risks for the accused, and that both the Fifth and Sixth Amendment rights must be violated before the statutory scheme would become vulnerable to constitutional attack. This construction of *United States* v. *Jackson* was rejected as illogical in *Alford* v. *North Carolina*, 405 F.2d 340, 345-346 (4th Cir. 1968).

[10] *State* v. *Peele*, 274 N.C. 106, 161 S.E.2d 568 (1968); *State* v. *Spence*, 274 N.C. 536, 164 S.E.2d 593 (1968).

not convincing. One of these positions is that the North Carolina provision for mandatory life imprisonment following a plea of guilty is for the benefit of the defendant and in mitigation of the death penalty, the harsher ordinary sentence for the offense of first degree burglary. It is pointed out that death was the only penalty prescribed for capital felonies in North Carolina, until the jury was given the right to recommend life imprisonment (obligating the judge to impose a sentence of life imprisonment) in 1941 for burglary and arson, and in 1949 for rape and murder,[11] and that the laws were further modified in 1953 to allow a defendant to plead guilty to a capital felony, in which event the life sentence would be imposed automatically.[12] It is pointed out, on the other hand, that the Federal Kidnapping Act, as originally enacted in 1932 contained no capital punishment provision,[13] and that the death penalty was added in 1934.[14] That any difference should result from this distinction is rejected by the case of *Pope* v. *United States,* 392 U.S. 651 (1968), applying the principle of *United States* v. *Jackson* to the death penalty provision of the Federal Bank Robbery Act, 18 U.S.C. sec. 2113(e) (1964), since the legislative history of the Federal Bank Robbery Act shows that as originally enacted, imprisonment and capital punishment were alternative punishments.[15] Moreover, this same argument, that the procedural

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[11] N.C. Session Laws 1941, c. 215, s. 1, 2; N.C. Session Laws 1949, c. 299, s. 1, 4.

[12] N.C. Session Laws 1953, c. 616.

[13] 47 Stat. 326 (1932).

[14] 48 Stat. 781 (1934).

[15] 48 Stat. 783 (1934).

system could be sustained because it was designed to benefit defendants who pleaded guilty, was advanced in *United States* v. *Jackson*, and it was explicitly rejected by the Court:

> The Government suggests that, because the Act thus operates "to mitigate the severity of punishment," it is irrelevant that it "may have the incidental effect of inducing defendants not to contest in full measure." We cannot agree. Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. . . . The question is not whether the chilling effect is "incidental" rather than intentional; the question is whether that effect is unnecessary and therefore excessive.
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> —390 U.S. at 582.

A second of these positions is that under the North Carolina system there is rigid court supervision before the guilty plea may be entered. True, the provision for submitting a guilty plea to a capital felony may be invoked only upon written application by the defendant, through counsel, with acceptance by the state, and approval by the court; and of course the state may refuse to accept the plea, and the judge may decline to approve it. It has not been shown, however, that these procedures are any less effective in protecting the defendant who acts with too much haste or who acts ill-advisedly in submitting a guilty plea, than Rule 11 of the Federal Rules of Criminal Procedure, under which the Federal Kidnapping Act is administered. Under Rule 11 the court may refuse to accept a plea of guilty, the court shall not accept a plea of guilty without first addressing the defendant personally and determining that

the plea is made voluntarily and with an understanding of the nature of the charge and the consequences of the plea, and the court shall not enter judgment upon a plea of guilty without being satisfied that there is a factual basis for the plea. The presence of rigid court supervision for guilty pleas in North Carolina is no point of distinction at all, because guilty pleas are policed with fully as much, if not more, care under the requirements of Rule 11 in the federal courts.

The third of these positions is that *United States* v. *Jackson* invalidates only the death penalty provision of the Federal Kidnapping Act, and has nothing to do with guilty pleas. This argument completely ignores the theoretical basis for the decision in *United States* v. *Jackson*. It was only because the statute was designed in such a way as to discourage the exercise of the rights not to plead guilty and to have a jury trial, that the provision for capital punishment in the statute was invalidated. By treating the death penalty clause as severable, the Court was able to strike out this portion of the statute and leave the balance intact. There are other methods of altering the statutory system, which apparently would have the effect of eliminating the defect. One alternative would be to do away with the guilty plea altogether and have all cases tried by jury. (This method was chosen by the 1969 Session of the North Carolina General Assembly.[16]) Another alternative would be to empanel a jury to fix sentences in cases of guilty pleas, as well as in cases of not guilty pleas.[17]

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[16] See n. 7, *supra*.

[17] See e.g., *Scarber* v. *State*, 226 Ark. 503, 291 S.W.2d 241 (1956); Wash. Rev. Code, secs. 9.48.030, 10.01.060, 10.49.010 (1956).

The only legitimate inquiry in this case is not whether the law of *United States* v. *Jackson* applies to *any* case in North Carolina in which a life sentence has been imposed upon a guilty plea to a capital felony, but whether this law applies to the *particular case* in question.

To begin with, the statutory system under which petitioner was convicted and sentenced, under objective scrutiny, must be regarded as creating a presumption that a defendant subjected to its terms has been unduly influenced against the assertion of his Fifth and Sixth Amendment rights to such an extent that his guilty plea is involuntary. This Court stated, "The *inevitable effect* of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional." *United States* v. *Jackson,* 390 U.S. at 581 (emphasis added).

At the same time the Court is of the opinion that not every defendant who enters a guilty plea to a charge under a statutory system with this defect does so involuntarily. *United States* v. *Jackson,* 390 U.S. at 583.

A resolution of whether the law of *United States* v. *Jackson* requires the guilty plea and sentence to be set aside in a particular case, necessitates an examination of the attendant facts and circumstances, just as in other instances where coerced pleas and coerced confessions are alleged. This in fact is the conclusion of *Alford* v. *North Carolina,* 405 F.2d 340 (4th Cir. 1968).[18]

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[18] Accord, *Laboy* v. *New Jersey,* 266 F. Supp. 581 (D.C.N.J. 1967).

The relevant circumstances in the present case include the fact that petitioner was 15 years old at the time of his conviction. Petitioner had failed his last year in school. Obviously his background and general experience were very limited. According to a medical résumé from Central Prison, petitioner was an uninhibited and impulsive individual, who would likely become involved in any direct behavior pattern that presented itself as a means of securing his immediate goals. Surely avoidance of the gas chamber became an immediate goal to the petitioner in the awesome and austere surroundings of the Superior Court of Halifax County, and the guilty plea emerged as a direct behavior pattern that became apparent as a means of securing this goal. Petitioner's trial attorney, called as a witness for the State in the post conviction proceeding, testified that he had told the petitioner that if he pleaded not guilty, he would receive the death penalty unless the jury recommended mercy, but that by pleading guilty he would receive a life sentence. It was counsel's advice to petitioner to plead guilty. Petitioner signed an affidavit, which had been prepared for him by his lawyer, before submitting his guilty plea; the affidavit stated, "I know this is a capital case. I also know that if I plead guilty I will be sentenced to life imprisonment." [19] Finally, in evaluating the voluntariness of petitioner's guilty plea in the light of the principles enunciated in *United States* v. *Jackson,* consideration must

[19] While the courts below have chosen to believe the State's evidence where it is contradictory to petitioner's evidence, it is interesting to notice that preying on the mind of petitioner's mother, Viola Parker, who was with petitioner in an anteroom of the court for most of the two days preceding the taking of petitioner's plea, and who agreed to the guilty plea, was the thought that petitioner would be executed if he did not plead guilty (App. 52, 54).

be given at the same time to other factors militating against the voluntariness of the plea, as outlined in Part III of this brief.

Petitioner contends that the involuntariness of the guilty plea in this case has been established as a matter of law,[20] on the ground of petitioner's youth, limited experience, mental aberration, and the admitted advice and encouragement by his counsel, when superimposed upon the inherently coercive nature of the statutory structure. In the alternative, it is petitioner's position that this case should be remanded to the Court of Appeals of North Carolina for further proceedings to determine whether the guilty plea was involuntary in the light of *United States* v. *Jackson,* since the Court of Appeals in the decision here under consideration incorrectly determined that *United States* v. *Jackson* was not relevant to the case.

Because of the magnitude of the deficiency in a statutory system which allows defendants to escape the gas chamber only by surrendering their rights to have jury trial and to be free from compulsory self-incrimination, and the likelihood that this deficiency ordinarily will have some substantial effect on a defendant's willingness to enter a guilty plea, the standard for evaluating the facts of the case on remand, should be the standard enunciated by this Court in *Chapman* v. *California,* 386 U.S. 18 (1967), in relation to the harmless error doctrine, where it was held that the reviewing court must be satisfied beyond a reasonable doubt that the error did not contribute to the defendant's conviction.

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[20] *Alford* v. *North Carolina,* 405 F.2d 340, 347-349 (4th Cir. 1968).

B. United States v. Jackson Should Be Applied Retroactively to This Case.

The next question that must be considered is whether the petitioner should be accorded retroactive relief in this case. The criteria which this Court has developed for guidance in determining whether a newly enunciated constitutional standard should be retroactive are "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall* v. *Denno,* 388 U.S. 293, 297 (1967).

The first of these criteria is by far the most important one. "Foremost among these factors is the purpose to be served by the new constitutional rule." *Desist* v. *United States,* 394 U.S. 244, 249 (1969). Where the newly developed constitutional standard affects the fundamental fairness of the proceeding, and, especially, where it may have a substantial bearing on the correctness of the determination of guilt or innocence, where the integrity of the fact-finding process is in question, the court is inclined to declare the rule retroactive. On the other hand, where the primary effect of the new rule is to cleanse criminal proceedings of conduct by police or officers of the court which infringe upon defendants' constitutional rights but do not have a great probability of affecting the fact-finding process adversely, the Court is inclined to provide that the rule operates only prospectively. *Johnson* v. *New Jersey,* 384 U.S. 719 (1966).

Accordingly, the Court has held non-retroactive the exclusionary rule for evidence obtained by unreasonable

searches and seizures, *Linkletter* v. *Walker,* 381 U.S. 618 (1965), since such evidence is not unreliable, and the purpose of the rule was to discourage police from conducting unlawful searches and seizures;[21] the rule excluding confessions obtained without the requisite warnings and provisions for counsel, in *Johnson* v. *New Jersey, supra,* because it was thought that the outlawed police conduct did not have great likelihood of producing false confessions, and since pre-existing rules were available to suppress confessions which were the product of more extreme forms of police conduct and hence more likely to be unreliable; the right of counsel during pre-trial lineups and other identification procedures, in *Stovall* v. *Denno,* 388 U.S. 293 (1967), because the Court was primarily concerned with enforcing the right of counsel and did not believe that the accuracy of the identification was substantially lessened in the absence of counsel; the prohibition of prosecutors and judges to comment adversely on the failure of a criminal defendant to testify, in *Tehan* v. *United States ex rel. Shott,* 382 U.S. 406 (1966), because the basic thrust of the rule was to discourage courts from penalizing the use of the privilege against self-incrimination, and it was not found that there were great probabilities of subverting the fact-finding process; and the right of jury trial in state criminal cases, in *De Stefano* v. *Woods,* 392 U.S. 631 (1968), on the premise that trials by judges are not demonstrably less fair than trials by juries.

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[21] Similarly the Court held non-retroactive in *Fuller* v. *Alaska,* 393 U.S. 80 (1968), the rule that evidence obtained in violation of Section 605 of the Federal Communications Act is inadmissible, and in *Desist* v. *United States,* 394 U.S. 244 (1969), the rule that evidence acquired by warrantless electronic eavesdropping cannot be introduced.

Consistent with these same distinctions are the cases in which the Court has held newly developed rules to be retroactive, including the right of counsel at the trial of serious cases, *Doughty* v. *Maxwell,* 376 U.S. 202 (1964), because the lack of assistance of counsel at trial almost invariably denies a fair trial;[22] the right to have coerced confessions excluded from the consideration of the jury, *McNerlin* v. *Denno,* 378 U.S. 575 (1964), since the psychological effect upon the jury of a defendant's confession is likely to have great weight in the deliberations of the jury; the right of confrontation and cross-examination of witnesses for the prosecution, in *Berger* v. *California,* 393 U.S. 314 (1969), because of a likely significant effect of these rights on the fact-finding process; the exclusion of co-defendant's inculpatory statements, in *Roberts* v. *Russell,* 392 U.S. 293 (1968), because of the strong probability that such statements would unduly influence the jury; and the right to have a jury from which persons with general opposition to capital punishment have not been excluded, in *Witherspoon* v. *Illinois,* 391 U.S. 510 (1968) (where the defendant has been sentenced to death), because such exclusion has an undermining effect on the process that decides defendant's fate.

The question of whether or not to extend retroactive application in each case requires an examination of the peculiar traits of the specific rule in question, and a judgment as to the matter of degree to which the fact-finding process is likely to be affected. The greater the likelihood

[22] Similarly the Court applied retroactively the right to counsel on appeal, *Anders* v. *California,* 386 U.S. 738 (1967); right to counsel on taking of a guilty plea, *Arsenault* v. *Massachusetts,* 393 U.S. 5 (1968); right to counsel at probation revocation hearing, *McConnell* v. *Rhay,* 393 U.S. 2 (1968).

of undermining the fact-finding process, the more the Court is inclined to fix its attention on the purpose to be served by the new standard, and to disregard the lesser criteria, of reliance by law-enforcement authorities and effect upon administration justice. *Johnson* v. *New Jersey,* 384 U.S. 719 (1966).

A plea of guilty "is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence." *Kercheval* v. *United States,* 274 U.S. 220, 223 (1927). By pleading guilty in this case, petitioner did not give up only a single constitutional right, such as the right to exclude a forced confession, or the right to keep out evidence seized in an unlawful search. By pleading guilty, petitioner surrendered virtually every right and privilege encompassed by criminal procedural due process. He yielded the right of trial by jury, the right of cross-examination and confrontation, the right to compel the attendance of witnesses in his own behalf, the right to be heard in his own defense, the right to be free from compulsory self-incrimination, the right to require the state to establish criminal conduct on his part and prove this beyond a reasonable doubt. It is noteworthy that among these rights surrendered by the petitioner, that of confrontation and cross-examination is in itself regarded as having such a potential effect on the validity of the guilt-determining process that it has been accorded retroactive application. *Berger* v. *California, supra.* The elimination of not one, but virtually all, of the criminal due process guarantees, compounds and strengthens the likelihood of unfairness to the petitioner and perversion of the guilt-determining process. The defendant's knowledge that he is innocent of the crime

charged, would in many cases be insufficient to deter him from pleading guilty, when he has the knowledge that a not-guilty plea carries the threat of death, while a guilty plea assures his life will be spared.

It is especially appropriate to contend for retroactive effect of the law of *United States* v. *Jackson,* if, as petitioner anticipates, there will be a requirement in cases concerning the application of this law to guilty pleas, that relief be allowed only in those instances where the state cannot satisfactorily establish that the defective statutory structure did not contribute to the offering of the guilty plea. If the law of *United States* v. *Jackson* is to operate in this manner, in each case where relief will be granted, the fact-finding process necessarily will have been undermined, and a classic situation for retroactivity will have been developed.[22a]

Next must be considered the other criteria outlined in *Stovall* v. *Denno,* 388 U.S. 293 (1967), for determining whether a newly declared constitutional right should be deemed retroactive. It is conceded that courts and officers

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[22a] Since petitioner is not contending here for retroactive application of *United States* v. *Jackson* as a per se rule to upset guilty pleas in every case, the case is in a different posture from *Holliday* v. *United States,* 37 U.S.L.W. —— (May 5, 1969), where retroactivity was denied to the recently declared rule that guilty pleas accepted in violation of Federal Rules of Criminal Procedure, Rule 11, would be set aside. In *Holliday* v. *United States* it was proved by the Government by ample evidence that petitioner's guilty plea was voluntary, despite the court's failure to comply with Rule 11; voluntariness has not been established by the State in the present case. Another point of distinction is that Rule 11 is simply a refinement of traditional safeguards for assuring the validity of guilty pleas, whereas the statutory procedure condemned in *United States* v. *Jackson* has an acknowledged tendency to induce guilty pleas. Finally the Rule 11 requirement was not predicated upon constitutional grounds.

of courts did not question the prevailing standards, and assumed it was proper to impose a term of life imprisonment upon a guilty plea, when the defendant by pleading not guilty would risk his life in a jury trial, until *United States* v. *Jackson* was decided. However, the effect of retroactive application upon the administration of justice, is not nearly as substantial as might appear on first impression.

It seems that only North Carolina and eight other States and the federal jurisdiction have statutory structures which would be affected by *United States* v. *Jackson*.[23] Statistical material which is available for some of these States indicates that not an overwhelming number of prisoners would be affected by retroactive application of *United States* v. *Jackson*, and in a great many instances these prisoners would have served so many years of their sentences that it would hardly be worthwhile for the state to expend its resources in retrying them.[24] It is not con-

[23] 18 U.S.C. sec. 1201(a) (kidnapping), 18 U.S.C. sec. 1111 (murder), 18 U.S.C. sec. 2113(e) (bank robbery), 21 U.S.C. sec. 176b (narcotics sales to minors), 42 U.S.C. sec. 2274-76 (atomic secrets); D.C. Code Ann., Sec. 22-2801; La. Code Crim. Proc., Art. 557; N.J. Stat. Ann., 2A:113-3, 4; N.H. Rev. Stat. Ann., 585:4, 5; N.Y. Code Crim. Proc., Sec. 332.1 (before the death penalty was abolished for most crimes in 1965); S.C. Code, Sec. 17-553.4; Tex. Vernon's Ann. Code Crim. Proc., Art. 1.14; Wyo. Stat. Ann., Sec. 6-59.

[24]

State	*Number of Prisoners Serving Life Sentences*	*Number Whose Life Sentences Imposed for Guilty Pleas to Capital Offenses*	*Average Number of Years Served by a Prisoner with a Life Sentence*
(1) United States			
(2) District of Columbia	92	92	—
(3) North Carolina	448	308	13½
(4) Texas	971	305	—
(5) Wyoming	15	5	9
(6) New Hampshire	15	10	18

(*footnote continued on next page*)

templated that every guilty plea made pursuant to the defective statutes would be set aside; an indefinite, but

Average Number of Years Completed by Prisoners Presently Serving Life Terms	*Number of Life Termers Now Eligible or Who Will Be Eligible Within 2 Years, for Parole*	*Source of Data*
(1)		
(2) 8	24	Letter District of Columbia Dept. of Corrections, July 10, 1969
(3) 10½	219	Letter N.C. Dept. of Correction July 16, 1969; and Statement of Jurisdiction, p. 9, *North Carolina* v. *Alford*, No. 50, October Term, 1969
(4) 8	85	Letter Texas Dept. of Corrections, July 18, 1969
(5) 5	15	Letter Wyo. State Prison, July 16, 196
(6) 7⅔	5	Letter New Hampshire State Prison, July 2 1969

* It was stated in *Natale* v. *United States*, 287 F. Supp. 96 (D.C. Ariz. 1968), holding *United States* v. *Jackson* retroactive, that only a handful of persons have been convicted under the Federal Kidnapping Act, 18 U.S.C. 1201(a).

The number of prisoners who might possibly be affected by retroactive application of *United States* v. *Jackson* perhaps should be increased to account for those in the situation of respondent in *North Carolina* v. *Alford*, No. 50, October Term, 1969, who pled guilty to the lesser included offense of second degree murder. At some point on the scale of lesser included offenses, however, the coercive effect becomes too attenuated to be taken into account. See Judge Haynesworth's dissent in *Alford* v. *North Carolina*, 405 F.2d 340, 349-350 (4th Cir. 1968). Alford's 30 year sentence was tantamount to a life sentence; it would seem that any term of years substantially less than life should be the stopping point.

Many of the prisoners eligible or nearly eligible for parole would elect not to bring post conviction proceedings out of fear that this conduct might be regarded by the parole authorities as inconsistent with the appearance of successful rehabilitation necessary for approval of parole.

necessarily considerable, number of prisoners would fail to secure new trials, because the state would be able to prove that the defective statutes did not render involuntary the guilty plea in the particular case. Clearly, the retroactive application of *United States* v. *Jackson* would not have an effect even approaching that of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), yet in this case, as in *Gideon* v. *Wainright*, the possibility of infecting the integrity of the fact-finding process is very great, and the unfairness to the defendant looms large.

III.

The Petitioner's Rights Under the Fourteenth and Fifth Amendments Were Violated by Allowing His Guilty Plea to Stand, When It Followed a Coerced Confession, and There Was No Showing That the Plea Was Not Influenced by the Confession.

The petitioner, then a 15 year old Negro child of humble circumstances, was arrested at gun point and taken to an interrogation room by white police officers. He told the officers he wanted to see his mother and a lawyer. They told him he could not see anyone until he gave them the information they wanted. The petitioner was kept in a cell alone overnight. He was not given anything to eat or drink; no water would come out of the spigot in his cell. During the night petitioner's mother was informed that her son was in custody, but the police told her it would be no use to come to the police station, because under no circumstances would she be allowed to see the petitioner. On the following morning petitioner was again questioned for about an hour, at which time the police secured an oral and written confession of housebreaking from him.

The petitioner's account of these events was not in any way contradicted by the police officers present at the post conviction hearing; the only evidence favorable to the State on this subject was the testimony of petitioner's lawyer, who said that petitioner told him soon after the confession was rendered that he had not been threatened, no promises had been made to him, and he was not scared.

Following his confession, the petitioner was held for a month in the Halifax County Jail. The jail attendants rebuffed efforts of petitioner's sister to visit him during this period.

Petitioner's attorney testified he was with the petitioner and his mother most of the day before the trial and the day of the trial. The petitioner and his mother both signed affidavits to the effect that they knew the nature and seriousness of the charge, they realized a guilty plea would require a sentence of life imprisonment, and they authorized the entry of this plea. Petitioner did not think he would be able to prevent the involuntary confession from being used against him in the event he were to plead not guilty, and the threatened use of this confession was a factor which motivated him to plead guilty. Petitioner's attorney did not remember any discussions with the petitioner about the legality of admitting the confession as evidence; he said he knew that if the confession was not kept out of evidence, the petitioner was "sunk." He advised the petitioner to plead guilty. The petitioner was questioned by the court before the plea was accepted. The court asked petitioner whether any promises were made or force applied to obtain the guilty plea, and whether the plea was being made with any fear or compulsion. Negative

answers to these routine questions were given. There is no indication that the court attempted to determine whether the confession had in any way influenced petitioner's guilty plea.

A psychiatric report showed the petitioner to be lacking in inhibitions against conduct directed towards securing immediate goals. Petitioner had failed the year of school preceding his trial.

The Court of Appeals of North Carolina upheld the finding of the Superior Court that petitioner's confession was voluntary. This conclusion cannot be sustained in the face of several decisions of this Court. The facts are very close to the facts of *Gallegos* v. *Colorado,* 370 U.S. 49 (1962). There a 14 year old defendant, after being taken into custody by the police, admitted at once the perpetration of an assault. The next day he gave a recorded confession, and six days later he signed a written confession. In the interim he was held without seeing a lawyer, his parents, or any friendly adult. His mother tried to see him on the day after the arrest, but she was told it was not a visiting day. In overturning the conviction, the Court said, "Adult advice would have put him on a less unequal footing with his interrogators. Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had. To allow this conviction to stand would, in effect, be to treat him as if he had no constitutional rights." 370 U.S. at 54-55.[25]

[25] See also *Haley* v. *Ohio,* 332 U.S. 596 (1948), where it was recognized that the confession of a Negro boy of 15 years cannot be weighed by adult standards of voluntariness.

The confession must also be deemed inadmissible because the police did not give the warnings to petitioner required by *Escobedo* v. *Illinois,* 378 U.S. 478 (1964); on the uncontradicted evidence, the defendant had been taken into custody, he was being interrogated for the purpose of obtaining a confession, he requested and was denied an opportunity to see a lawyer, and the police did not warn him of his absolute right to remain silent. Petitioner's trial was on August 18, 1964, so the rules of *Escobedo* v. *Illinois* were applicable. *Johnson* v. *New Jersey,* 384 U.S. 719 (1966).

The Court of Appeals of North Carolina concluded that petitioner's confession was voluntary, and hence the court did not address itself clearly to the problem of determining whether the confession in any way influenced the guilty plea. North Carolina subscribes to the rule that where an involuntary confession has been obtained, a presumption arises which imputes the same prior influence to any subsequent confession, and this presumption must be overcome before the subsequent confession can be received into evidence. *State* v. *Gibson,* 216 N.C. 535, 5 S.E.2d 717 (1939). As this Court has observed, "(A)fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good." *United States* v. *Bayer,* 331 U.S. 532, 540 (1947). The connection between a prior involuntary confession and a later confession must be so attenuated as to dissipate the taint. *Wong Sun* v. *United States,* 371 U.S. 471 (1963). This is a constitutional rule binding upon the states. *Clewis* v. *Texas,* 386 U.S. 707 (1967). Reason requires that the "second confession" rule apply when the second confession

consists of a guilty plea, a judicial confession. Thus in *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U.S. 116, 118 (1956), it is said, "(A) conviction following trial or on a plea of guilty based on a confession extorted by violence or by mental coercion is invalid under the Federal Due Process Clause." On this ground guilty pleas based on coerced confessions were set aside in the case of *Chambers* v. *Florida*, 309 U.S. 227 (1940).[28]

The only evidence in this case bearing on the voluntariness of the petitioner's guilty plea consists of an affidavit procured from petitioner by his attorney to the effect that petitioner understood the charge and sentence and authorized the entry of the plea, and the routine leading questions of the trial judge as to whether the plea was made without any fear, promise, or compulsion. None of this evidence provides any enlightenment about whether the guilty plea was influenced by the coerced confession. The guilty plea, like the second confession, is presumed tainted by the prior coerced confession, and deemed involuntary until the state overcomes this presumption. *Dorsciak* v. *Gladden*, —— Or. ——, 425 P. 2d 177 (1967). It has been held in this connection that the state must prove dissipation of the primary taint beyond a reasonable doubt. *People* v. *Spencer*, 66 Cal.2d 158, 424 P. 2d 715 (1967). This result is consistent with, if not required by, the doctrine of *Chapman* v. *California*, 386 U.S. 18 (1967), holding that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.

[28] It is academic that a guilty plea defectively obtained cannot constitute a waiver of any of defendant's rights, here his right to be relieved of the effects of the coerced confession. *Von Moltke* v. *Gillies*, 332 U.S. 708 (1948).

The petitioner contends that in this case the Court of Appeals of North Carolina employed a manifestly incorrect standard by requiring petitioner to prove that "as a matter of law . . . petitioner's guilty plea was the product of his prior confession to the police." (App. 96-97) Here the only probative evidence did not rebut the presumption that the plea was affected by the prior confession, but was supportive of the presumption. Petitioner thought the confession would be used against him, and the threatened use of it influenced him to plead guilty. Petitioner's counsel was afraid the confession would be used, he did not tell petitioner that it could be kept out, and he knew that if the confession were not excluded his client was "sunk."

The determination that petitioner's guilty plea was voluntary cannot be upheld against the plain facts and legal effect of his confession to the police and the month-long detention, especially when considered in light of the inherently coercive features of the statutory procedure providing the guilty plea as the only sure means of escape from the gas chamber.[27]

In the event the Court should determine that *United States* v. *Jackson* is not to be applied retroactively to this

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[27] Some testimony relevant on the question of petitioner's guilt or innocence of burglary and rape was extracted at the post conviction hearing from petitioner, his mother, and his trial attorney, over objection by counsel. The Court of Appeals of North Carolina ruled that admission of this evidence was erroneous, as having no place in a post conviction hearing, the purpose of which is to determine whether petitioner's constitutional rights were violated at trial (App. 99). From petitioner's testimony in this regard, however, it is clear that he believed in his innocence of rape and burglary at the time of trial, and continues to adhere to this belief, in that petitioner understood he was having intercourse with consent of the prosecuting witness (App. 44). This belief, of course, is inconsistent with petitioner's guilty plea.

case, petitioner contends that, nevertheless, his conviction should be set aside because the influence the defective statutory arrangement had on petitioner's guilty plea, when combined with the effect of the confession, would seem to establish that the guilty plea was involuntary, as a matter of law.[28] At least the Court of Appeals of North Carolina should, in the light of a holding of this Court that the statutory procedures are contrary to the law of *United States* v. *Jackson,* be required to reconsider the case on that ground, as well as being required to apply to this case the constitutionally correct standard for assessing the effect of involuntary confessions upon subsequent guilty pleas.

Conclusion

For the reasons stated above, the petitioner respectfully prays that the judgment of the Court of Appeals of North Carolina in this case be reversed and the case be remanded.

Norman B. Smith
728 Southeastern Building
Greensboro, N. C. 27402
Telephone AC 919 275-8552

Larry B. Sitton
700 Jefferson Building
P. O. Drawer G
Greensboro, N. C. 27402
Telephone AC 919 273-8264

Counsel for Petitioner

[28] *Davis* v. *North Carolina,* 384 U.S. 737 (1966), stands for the proposition that newly developed constitutional standards, which have been declared to be prospective in effect, while not available for retroactive application per se, may be taken into consideration along with other factors in the situation in determining whether relief should be granted.